IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 51

UNITED STATES OF AMERICA,
Appellant,

v.

THE PROCTER & GAMBLE COMPANY,
COLGATE-PALMOLIVE COMPANY,
LEVER BROTHERS COMPANY and
THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE COLGATE-PALMOLIVE COMPANY.

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CITATIONS.

Cases:

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The appellee Colgate-Palmolive Company, a defendant below, pursuant to Rule 16 of this Court respectfully moves to dismiss the instant appeal, on the ground that it is not within the jurisdiction of this Court because not taken in conformity with statute, or in the alternative to affirm the judgments below, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Question Presented.

The appellant's statement of the question presented by this appeal is phrased in such a way as to obscure the issue before this Court. The jurisdictional statement at page 3 and the notice of appeal both state under this heading:

> "During pretrial proceedings, the district court directed the United States, over its objection and on pain of dismissal of the suit, to permit the defendants to inspect and copy the transcript of the testimony of all witnesses who had appeared before the grand jury. When the United States refused to permit such inspection, the court dismissed the suit. The question presented is whether the district court erred in directing the Government to make such disclosure of the grand jury transcript."

In fact, however, the district court did not make any direction over the Government's objection and "on pain of dismissal of the suit." On July 24, 1956 the court entered production orders relating to grand jury testimony over the Government's objection. But these orders were not "on pain of dismissal of the suit." They specified no sanction if they were disobeyed, and at the time of their entry neither the court nor any party had suggested dismissal. The appellant itself, to be relieved of the directive contained in the court's orders, and to limit the possible consequences of its refusal to produce, proposed the substitution of an amended order providing that unless production was made the suit would be dismissed. This was the only order that could be said to be "on pain of dismissal of the suit." Since this order was proposed by the Government, however, it can hardly be said to have been entered over the Government's objection.

It is thus apparent that the question presented is not accurate as the appellant puts it. Whether "the district court erred in directing the Government to make such disclosure" is moot and cannot be brought up by the judgments appealed from. The only orders directing disclosure were superseded on the appellant's motion. All that can remain alive is the question of whether the district court erred in entering an order, on the appellant's motion, providing that the action would be dismissed unless the Government produced the transcript. As so stated the question reveals on its face the weakness of the appellant's position. This doubtless explains why the appellant chose to present the issue as though the appeal had been taken from the superseded orders and to omit from its statement of the question presented all reference to its own invitation of dismissal.

Counter-Statement of Facts.

The history of the present litigation is set out in some detail in two opinions of the court below which are reported at 19 F. R. D. 122 and 19 F. R. D. 247, and which are appended to appellant's jurisdictional statement. The following facts are significant for present purposes.

A grand jury sitting in the District of New Jersey from May 1951 until November 25, 1952 investigated possible violations of the antitrust laws in the soap and synthetic detergent industry. Firms under investigation included the present defendants. No indictment was returned. On December 11, 1952 the complaint in the present civil action was filed.

A complex pretrial discovery procedure ensued. In the course of this procedure each of the defendants moved for an order permitting such defendant to inspect and copy the transcripts of testimony of witnesses before the grand jury.

The motions are set out at pages 1-10 of the appellees' joint appendix, which is bound separately.

These motions were argued extensively on December 12, 1955. On April 17, 1956 the first opinion cited above was handed down by Judge Modarelli, granting the motions for inspection in full.

The plaintiff then filed a motion for reconsideration attaching a formal "claim of privilege" with respect to the transcripts, signed by the Attorney General. This motion was argued at length on June 11, 1956; and on July 9, 1956 the second opinion cited above denied the motion. The court summarized the reasons for the earlier decision as follows:

> "I concluded that since the plaintiff is using the transcripts containing relevant information, and since equal use of the transcripts by defendants will give them the fullest possible knowledge of the facts before trial, and since none of the reasons for the rule of secrecy applies, the ends of justice required me to grant the motions." (Jurisdictional statement, pp. 49-50).

At a hearing on July 23, 1956, the defendants submitted orders for production in a form which had been consented to by the plaintiff. The full transcript of that hearing appears at pages 11-15 of the joint appendix. The following colloquy is of particular significance:

> "Mr. McDowell: I am instructed, your Honor, by the Attorney General to inform the Court that the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered.
>
> "The Court: You heard what Mr. McDowell said?
>
> "Mr. Correa: Yes; if your Honor please, I heard what Mr. McDowell has said. Now, the order in the

> form submitted to your Honor provides that the Government shall make production within thirty days from the entry of the order. I take it that that means, as a practical matter, that we shall have to wait till the expiration of that time to find out whether the Government adheres to the position which has been enunciated here this morning or not. If they do adhere to that position then, I take it, we shall have to take such further steps under the rules as we may be advised." (Joint appendix, pp. 13-14).

Under Rule 37(b) of the Federal Rules of Civil Procedure these steps might have included a motion to place the plaintiff's representatives in contempt of court, a motion to preclude the Government from offering proof with respect to any matter covered in the grand jury minutes, or a motion to stay the proceeding, as well as a motion to dismiss. No indication was made, however, as to which if any of these remedies might be asked or granted. Nowhere in this hearing, nor in any other manner to the date of this hearing, had either the court below or any defendant suggested that the action might be dismissed if the plaintiff refused ultimately to produce the transcripts.

The court signed the orders on July 23, 1956 as submitted, and they were entered the following day. They appear at pages 16-23 of the joint appendix. These orders denied the plaintiff's motion, granted the defendants' motions and ordered production for inspection and copying of the transcripts of the testimony of all witnesses before the grand jury within thirty days of entry.

On August 16, 1956, prior to the expiration of thirty days, the plaintiff filed a "motion to amend or, alternatively, to stay order of July 24, 1956" attaching a proposed form of order, an affidavit of Herbert Brownell, Jr. and a brief. These papers appear at pages 24-31 of the joint appendix.

The motion was for "the Court to enter an amended order, in the form attached hereto, in substitution for the orders" previously entered. Alternatively, stay of the previous orders pending appeals and/or application for an extraordinary writ was asked.

The basis for the motion is given in the brief as follows:

> "We believe that it would be unseemly for the Attorney General, as the chief law enforcement officer of the United States, to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order in order to obtain effective appellate review thereof. Under these circumstances, we urge the Court to enter an amended order which provides that if the transcripts are not made available by August 24 (the date previously fixed by the Court), an order will be entered dismissing the complaint. Such an amendment of the order of July 24 would in no way prejudice the defendants, and it would avoid placing the Attorney General of the United States in the dilemma above noted. * * *" (Joint appendix, p. 30.)

An intention to appeal this amended order is then stated. In motion, affidavit and brief the alternative of staying rather than amending the orders of July 24, 1956 is clearly recited as the plaintiff's second choice if the court will not dismiss.

A hearing of this motion was had on August 21, 1956. The transcript of this hearing is set out at pages 33-39 of the joint appendix. The following statement is of particular interest:

> "Mr. Friedman: May it please your Honor, the order which your Honor entered in this matter on the 24th of July directed the United States to make

available to the defendants within thirty days the grand jury transcripts. This order by its terms places the Attorney General in a very difficult dilemma, because he has a number of alternatives and we think that each of these alternatives would involve a serious violation of an important public interest which the Attorney General thinks he should carry out. And we are therefore coming before your Honor to suggest that the order be amended in a way to eliminate these possibilities. And, alternatively, if your Honor does not see fit to amend the order we are asking for a stay of the order pending the taking of necessary appellate review in the Supreme Court.

"The amendment which we are proposing to your Honor is that instead of the order directing us within thirty days to make the grand jury transcripts available that the order recite that in the event the United States does not make the grand jury transcripts available within thirty days the Court will then enter an order of dismissal" (Joint appendix, pp. 34-35).

Each of the defendants in effect took the position that it did not see how it could oppose entry of the proposed amended order.

Accordingly the order submitted by the plaintiff as part of its motion papers was signed by the court precisely as submitted, except that at the suggestion of one of the defendants and with the consent of the plaintiff the word "Amended" was added in ink to the word "Order" in the caption (Joint appendix, p. 38). The amended order required production by August 24, 1956, this being the date upon which the time for production under the original order would have expired.

Under date of September 6, 1956 the court addressed a letter to all counsel, inquiring whether the transcripts had been produced and concluding:

> "If the plaintiff has not produced, the court will enter an order dismissing the complaint as provided in the amended order."

A copy of this letter appears at pages 40-41 of the joint appendix.

All defendants replied under date of September 7, 1956 that no production had been made and each attached a proposed form of judgment dismissing the action. Copies of these letters and forms of judgment were sent to the plaintiff. The plaintiff also replied to the court under date of September 7, 1956. A copy of this reply is set out at page 42 of the joint appendix. The entire body of this letter was as follows:

> "I have Your Honor's letter addressed on September 6, 1956 to counsel in the above-entitled cause. In response to your inquiry I must respectfully state that plaintiff has not produced the grand jury transcripts for inspection by the defendants."

On September 13, 1956 the court signed the judgment submitted by each defendant, and all four judgments were then filed. They appear at pages 56-59 of the jurisdictional statement.

Summary of Argument.

1. The judgments appealed from are consent judgments, entered on the invitation of the appellant for its benefit. Having achieved the benefits of being relieved of an obligation to produce the grand jury testimony and of limiting the consequences of refusal to produce to dismissal of the action, the appellant cannot now complain of the dismissal.

2. Under the applicable decisions of this Court and other courts, consent judgments are affirmed without consideration of the merits of any claim of error, inasmuch as any error is waived by the consent.

3. To grant review of invited dismissals would necessarily be to authorize a procedure for appeal of interlocutory orders in circumvention of the statutes limiting appeals to final judgments.

4. The orders for production of the grand jury testimony were a proper exercise of discretion by the district court under Rule 6(e) of the Federal Rules of Criminal Procedure and Rule 34 of the Federal Rules of Civil Procedure. The grand jury testimony was used by the appellant in the preparation and prosecution of the present civil action. The liberal civil discovery rules, especially vital to the expeditious administration of major antitrust litigation, require disclosure of the testimony unless a countervailing policy prevents. In the present situation, the grand jury having been discharged several years, the traditional reasons for secrecy are inapplicable.

POINT I.

The judgments of dismissal appealed from are consent judgments invited by the appellant.

From the foregoing statement of facts in the record certain conclusions are apparent as to the nature of the judgments appealed from and of the prior orders.

1. **The appellant proposed the substitution of the amended order for the original orders for the purpose of**

achieving certain results which it desired. The appellant's avowed object in proposing the amended order was to avoid the "unseemly" aspects of being "required to disobey" an order of the court. The amended order relieved the Attorney General of the court's command to make production.

The amended order also gave the Government an election of the remedies available against it as a result of its failure to make production. Appellant's counsel noted that the Attorney General had "a number of alternatives" and requested that "the order be amended in a way to eliminate these possibilities" (Joint appendix, pages 34-35).

Normally one who chooses to disobey a court's discovery order has no say as to the consequences. It is for the court and the other parties to determine what should be done. The offending party may, for example, find himself subject to a contempt order. If as was represented to the district court the appellant considered it "unseemly" for the Attorney General to be "required to disobey" a court order, it would probably have considered it even more unseemly for one of the Attorney General's subordinates to be held in contempt of court as a consequence of such disobedience.

It goes without saying that the Government was not entitled as a matter of right to relief from the "unseemly" aspects of being "required to disobey" a court order. The Government, like any private litigant, must take this factor into consideration in deciding whether it is really "required" to disobey an order of court. The Government is entitled to no special advantage in the courts.

It is therefore apparent that by securing the amended order the appellant obtained what from its point of view were significant advantages—advantages in exchange for which it freely tendered the dismissal from which it now appeals.

2. **The original orders directing production of grand jury testimony were superseded.** The appellant's motion was for "an amended order, in the form attached hereto, in substitution for the orders entered in the above-entitled action on July 24, 1956 . . .". When this amended order was entered, the provisions of the earlier orders directing production were in effect expunged. It was as if they had gone out of existence. By proposing the substitution the appellant mooted the issue of whether the original orders were properly entered. The propriety of these orders became as moot as the constitutionality of a statute which has been repealed retroactively to the date of its enactment. The only issue remaining in the case became whether the amended order—proposed by the appellant—was properly entered. That is the sole issue on this appeal from the judgments entered upon that order.

3. **The judgments were entered at the invitation of the appellant.** This invitation was made in three steps. First, the appellant proposed to the court the amended order containing the language that "unless the plaintiff on or before August 24, 1956 produces" the grand jury minutes, "the Court will enter an order dismissing the complaint herein." Second, the appellant failed to produce the minutes within the designated time. Third, although the court advised counsel for the appellant that it proposed to "enter an order dismissing the complaint as provided in the amended order," the appellant did not take any steps to oppose entry of the judgments of dismissal, either as to form or as to substance. Accordingly, the appellant must be taken not only to have consented to these judgments, but actually to have invited their entry.

4. The appellant was not subjected to an involuntary dismissal; it made a deliberate choice among a number of alternatives open to it.

a. Appellant recognized that it had "a number of alternatives". Thus it might have sought a stay of the original production orders pending appeal and/or application to this Court for an extraordinary writ. This relief was in fact proposed as a second choice in the moving papers below. Presumably the appellant had a reason for not preferring this most straightforward attempt at review. Undoubtedly counsel for the appellant anticipated objection to invoking the jurisdiction of this Court at what was obviously a preliminary stage of an extended proceeding. By arranging for the dismissal of the complaint, they may have hoped to prevent the Court from considering such an objection. Since the Government is always free to file a new complaint, based on the circumstances then alleged to exist, dismissal of a former complaint was likely to entail little serious hardship to the Government. This is particularly true where the action has been pending for four years. Thus a dismissal may have been considered the most hopeful device for perfecting an appeal from a preliminary ruling.

b. The appellant might have waited for a final judgment to be imposed. It could simply have gone forward with its case. This would have provoked the question of what should be done about its failure to comply with the court's orders. Had the remedy decided upon been an order citing counsel for contempt of court, review of the propriety of the production orders might have been attempted on appeal from the contempt orders. Had the remedy decided upon been an order precluding the offering of evidence as to certain areas of proof, the appellant

might have tried to establish its case as best it could under this handicap, and if it failed, appealed from the consequent dismissal. This would have been similar to what was done in *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793. Other remedies might have been invoked, as to the propriety of which the appellant would have been heard; but the choice would have been the court's.

c. Instead the appellant chose to take matters in its own hands and invite, in effect, the entry of an immediate dismissal. This secured judgments which were technically "final" without subjecting the appellant to the possible expenses, delays and embarrassment of normal litigation. By demanding and receiving these concessions, however, the appellant defeated its purpose. It cannot have its own way in the trial court and at the same time play the part of an aggrieved party in an appellate court. No matter how much it objects to production of the grand jury minutes, it cannot escape the fact that the order directing dismissal of the case if the minutes were not produced, and the judgments following from that order, were its own idea.

POINT II.

A consent judgment is affirmed on appeal without consideration of the merits.

A. Consent judgments in general.

A consent judgment is no less a consent judgment because one of the consenting parties is dissatisfied with some aspects of it. It is safe to say that most antitrust consent decrees are considered objectionable by one of the consenting parties. The decrees are often agreed to not

because they are satisfactory to the defendant, but rathe
because they are considered preferable to what migh
otherwise follow. The Government's situation here is a
analogous one. It chose what it regarded as the leas
of various evils.

Nevertheless it is settled law that the right of appea
in the federal courts is not open to one who has made such
a choice. That right is reserved for those who have used
their every resource to prevent the entry of judgment
against them. Any contrary doctrine would lead to abuse
of appellate jurisdiction, as is more fully developed in
Point III.

Viewed in this light it becomes obvious that one who
has consented to judgment against himself for the avowed
purpose of presenting his case to an appellate court not
only does not thereby become entitled to appeal, but in fact
loses any opportunity to appeal he might otherwise have
had.

This precise situation was considered in *United States*
v. *Babbitt*, 104 U. S. 767. The plaintiff below lost an action
in the Court of Claims to have service as a cadet included
in his army longevity pay, but the Attorney General con-
sented to a *pro forma* judgment in favor of the plaintiff
so that the question could be appealed. This Court affirmed
the judgment without considering the merits, holding:

> "The consent to the judgment below was in law a
> waiver of the error now complained of" (104 U. S.
> 768).

See also *Ballot* v. *United States*, 171 Fed. 404 (1st Cir.
1909).

The *Babbitt* decision follows the universal rule in the
courts of the United States from the earliest times, that

a final judgment entered by consent will not be reviewed.* The usual formulation is that the appellate court has jurisdiction of the appeal, but the judgment will be affirmed without consideration of the merits. In a few cases the appeal has been dismissed. This Court's most recent detailed statement of the rule appears in *Swift & Co.* v. *United States*, 276 U. S. 311, 323-4, an opinion by Mr. Justice Brandeis:

> "The decree sought to be vacated was entered with the defendants' consent. Under the English practice a consent decree could not be set aside by appeal or bill of review, except in case of clerical error. *Webb* v. *Webb*, 3 Swanst. 658; *Bradish* v. *Gee*, 1 Amb. 229; Daniell, Chancery Practice, 6th Am. ed., 973-974. In this Court a somewhat more liberal rule has prevailed. Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered, *Pacific R. R. Co.* v. *Ketchum*, 101 U. S. 289, 295; *White* v. *Joyce*, 158 U. S. 128, 147; or of fraud in its procurement, *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451; or that there was lack of federal jurisdiction because of the citizenship of the parties. *Pacific R. R. Co.* v. *Ketchum, supra.* Compare *Fraenkl* v. *Cerecedo*, 216 U. S. 295. But 'a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause.' *Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States*, 113 U. S. 261, 266. Compare *United States* v. *Babbitt*, 104 U. S. 767; *McGowan* v. *Parish*, 237 U. S. 285, 295. . . ."

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* As this Court states in *Thomsen* v. *Cayser*, 243 U. S. 66, it is not an appeal from a consent judgment for a plaintiff who is successful in the trial court, but whose case is remanded for a new trial by an appellate court, to waive the right to a new trial and take judgment absolute for the purpose of appeal to this Court.

The basis for the rule is usually expressed in terms of waiver. This was the rationale of the leading case of *Pacific Railroad* v. *Ketchum*, 101 U. S. 289. To the same effect is *Securities and Exchange Commission* v. *Jones*, 85 F. 2d 17 (2d Cir. 1936), *cert. denied*, 299 U. S. 581.

It would seem also that a party cannot be aggrieved by a judgment to which he has consented. Thus in *United States* v. *Star Const. Co.*, 186 F. 2d 666, 669 (10th Cir. 1951), in affirming a judgment, the court said of a tax credit included in the judgment to which the United States Attorney had agreed:

> "A party is not aggrieved by a ruling regularly made, with his express or implied consent."

This formulation has been adopted in 13 *Cyclopedia of Federal Procedure* §57.58 (3d ed. 1952), which states:

> "A consent judgment or decree, or one brought about by consent is not appealable. The reason is that a consenting party is not aggrieved by it and by consenting the plaintiff has estopped himself to complain of the judgment."

One who is not aggrieved by a judgment may not appeal it, *Parr* v. *United States*, 351 U. S. 513.

Frequently courts dispose of appeals from consent judgments or orders in summary fashion, by affirming the lower court's ruling without discussion. See, for example, *Waterworks Company* v. *Barret*, 103 U. S. 516, and *United States* v. *All American Airways, Inc.*, 180 F. 2d 592 (9th Cir. 1950). This is presumably done because the rule concerning such orders is so well established and so obviously desirable. Thus in *International Carrier-Call & Television Corp.* v. *Radio Corporation of America*, 142 F. 2d 493, 494 (2d Cir. 1944), Judge Swan said for the court:

> "Counsel then consented to a dismissal with prejudice, and the court so ordered . . . Having consented to a final dismissal of the unfair competition count, it is utterly fatuous to suppose that this part of the judgment can be reversed on appeal." Pacific R. R. *v.* Ketchum, 101 U. S. 289, 295, 25 L. Ed. 932; Marks *v.* Leo Feist, Inc., 2 Cir., 8 F. 2d 460, 462."

In the present case the appeal is from the judgments of dismissal, and the only question that can be presented is whether entry of those judgments of dismissal was error. The appellant having consented to the entry of those judgments, an unbroken chain of authority holds that any error was waived and the judgments must be affirmed.

B. Acceptance of benefits.

The avowed purpose of appellant's procedure was relief from the court's direction to produce the grand jury transcripts. By securing an amended order containing no express direction to produce, but rather giving the alternative of production or dismissal, the Government achieved its stated objective of avoiding the "unseemliness" of being "required to disobey" an order of court. It also limited the consequences of refusal to produce and assured itself that none of its representatives would be subjected to a contempt citation. The burden assumed in exchange for these concessions was to be production or dismissal, at the appellant's option. The appellant chose dismissal. Now, however, having secured the benefit of the concessions it seeks to undo the dismissal, which was the *quid pro quo* it had tendered.

Similar attempts to eat one's cake and have it too are often involved in appeals from consent judgments. One who appeals from such a judgment is frequently in the position of having accepted a benefit under the judgment; and

by his appeal he seeks either to secure a further benefit or to be relieved of the concomitant burden. This he will not be allowed to do.

United States v. *Benedict*, 261 U. S. 294, illustrates the principle. This was an action for recovery from the United States for certain lands taken along New York Bay. In the course of an appeal by the United States from the award given the former property owner, the Circuit Court of Appeals in an opinion upheld the award but said a new trial would be granted unless the plaintiff below assigned to the City of New York, a defendant, an amount proportional to the area of the platted streets. The plaintiff assigned this amount to the City, which accepted it, and the contested judgment was formally affirmed. The City by writ of error then sought an additional amount for portions of the streets between the high-water line and the pierhead line. This Court held in an opinion by Mr. Justice McReynolds:

> "We think it may not deny voluntary acceptance of the assignment and full assent to the arrangement which defendant in error carried out with the obvious purpose of ending the controversy between them. It cannot hold what it accepted and demand more. The final judgment must be treated as though entered upon its express consent; and its writ of error is accordingly dismissed" (261 U. S. 298).

The most recent case in the Courts of Appeals on appealability of consent judgments adopts a similar rationale, *White & Yarborough* v. *Dailey*, 228 F. 2d 836, 837 (5th Cir. 1955). There also the appellant had accepted payment under an agreed judgment and subsequently sought to appeal. In a *per curiam* opinion dismissing the appeal the court said:

> "It is not such a case, first, because the appeal sought to be taken is from an agreed judgment, the

benefits of which have been accepted. 'The reason for this rule is that a party cannot proceed to enforce and have the benefit of such portions of a judgment as are in his favor and appeal from those against him. In other words, the right to proceed on a judgment and enjoy its fruits and the right to appeal therefrom are totally inconsistent positions and the election to pursue one course must be deemed an abandonment of the other.' * * *"

C. Voluntary dismissals.

It not infrequently happens that before verdict a plaintiff decides, perhaps as a result of a ruling of the court, that it is either undesirable or impossible for him to proceed. He then requests that the action be dismissed. Such dismissals are often referred to as voluntary nonsuits. Sometimes he tries to appeal from this dismissal if it was inspired by an adverse ruling.

Such consent judgments of dismissal are treated precisely like other consent judgments. In the federal courts and the courts of most states they are affirmed without consideration of the merits of any objection to rulings behind the judgment, or the appeals are dismissed.

Where such voluntary dismissals are entered upon the invitation of the plaintiff alone, as in the present case, they fall more obviously within the rule that an appellant cannot complain of "invited error", whether the supposed error be in the admission of evidence, *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U. S. 228, 231; in failure to sit with a jury, *Law* v. *United States*, 266 U. S. 494, 495; in instructions to the jury, *The Schools* v. *Risley*, 10 Wall. 91, 114; or in granting a nonsuit. Thus it was said in *Francisco* v. *Chicago & A. R. Co.*, 149 Fed. 354, 355 (8th Cir. 1906):

"But a judgment of nonsuit on the motion, at the request or with the consent of the plaintiff, is not

> reviewable by writ of error at his suit; because he is estopped from convicting the trial court of an error which he requested it to commit."

The leading decisions on voluntary nonsuits are *United States* v. *Evans*, 5 Cranch 279, and *Evans* v. *Phillips*, 4 Wheat. 73, a *per curiam* judgment dismissing the writ of error. In *United States* v. *Evans* it appears that at the trial certain testimony was rejected, and the attorney for the United States then became nonsuit. On a writ of error the decision is given as follows:

> "Marshall, Ch. J., delivered the opinion of the court, that in such a case, where there has been a nonsuit, and a motion to re-instate overruled, the court could not interfere.
>
> "Judgment affirmed."

The rule of these cases is repeated in *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 39, which seems to be the last time this Court has expressed a view on the matter. In *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 794-5, fn. 1, this Court noted on a motion to dismiss the appeal that the record failed to sustain the appellees' contention that the Government invited dismissal of the action. The implication of the footnote appears to be that if the Government had invited dismissal the appeal would not have been heard.

The Courts of Appeals have frequently considered the appealability of voluntary dismissals and, so far as we can determine, each of the seven Circuits that has passed on the question since 1900 has decided that voluntary dismissals are not subject to review. *Rudolph* v. *Sensener*, 39 App. D. C. 385 (D. C. Cir. 1912); *Fernandez* v. *Carrasquillo*, 146 F. 2d 204 (1st Cir. 1944); *International Carrier-Call & Television Corp.* v. *Radio Corporation of America*, 142 F. 2d 493 (2d Cir. 1944); *Marks* v. *Leo Feist, Inc.*, 8 F.

2d 460 (2d Cir. 1925); *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936); *Doggett* v. *Hunt*, 199 F. 2d 152 (5th Cir. 1952)*; *Cybur Lumber Co.* v. *Erkhart*, 247 Fed. 284 (5th Cir. 1918); *Stewart* v. *Lincoln-Douglas Hotel Corp.*, 208 F. 2d 379 (7th Cir. 1953); *Francisco* v. *Chicago & A. R. Co.*, 149 Fed. 354 (8th Cir. 1906).

In all of these decisions the action was simply dismissed, in some cases with prejudice and in others without. In none was the dismissal a part of a plan proposed by the plaintiff under which he would be relieved of an affirmative duty imposed by the court in exchange for the dismissal. The benefit, if any, achieved by the plaintiffs in these cases was thus considerably less tangible than in the present case. *A fortiori*, therefore, the judgments of dismissal here are not subject to review.

POINT III.

To permit appeal of consent dismissals would necessarily permit plaintiffs to obtain appeal of interlocutory orders.

To permit a plaintiff to tender a judgment of dismissal after an adverse interlocutory ruling and then appeal the ruling in the guise of appealing the final judgment would plainly be to permit appeal of the interlocutory ruling. Such appeals are in circumvention of the various federal

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* The subsequent decision in *Vaughan* v. *City Bank & Trust Co.*, 218 F. 2d 802 (5th Cir. 1955), *cert. denied*, 350 U. S. 832, may appear inconsistent through its conversion on the basis of the record of a dismissal voluntary on its face to an involuntary dismissal for want of prosecution; the appeal was heard and the judgment affirmed on the merits. The plaintiff appeared without counsel, which may have influenced the court. The still more recent decision in *White & Yarborough* v. *Dailey*, discussed above, shows that this court still follows the general rule as to consent judgments.

statutes governing appeals, as, for example, that under which the present appeal purports to be brought, 15 U. S. C. §29, which permits appeal to this Court from "the final judgment of the district court".

The door would be thrown open equally to appeals from voluntary dismissals with and without prejudice, inasmuch as this Court has held that the fact that a dismissal is without prejudice does not make the cause unappealable, the suit being ended as far as the district court is concerned, *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793.

If voluntary dismissals are appealable, a plaintiff who receives an adverse interlocutory order would in many cases lose almost nothing by requesting a dismissal without prejudice. If it was granted, he could then appeal his interlocutory order as of right. If the interlocutory order was incorrect, he would secure a reversal and be where he was before. If it was correct, the dismissal would be affirmed but he could begin again. Thus he would have obtained in the fullest practical sense review of the interlocutory order at virtually no risk.

If he requested and received a dismissal with prejudice he could still obtain review of the interlocutory order, although with a somewhat greater risk. If the order was right, he would, of course, be concluded. If it was wrong, however, judgment would be reversed and the case continue. Thus a plaintiff in a single action could bring up on appeal several interlocutory orders after voluntary dismissals with prejudice. So long as he prevailed on appeal the orders would be reversed and the case proceed until the next interlocutory order which he chose to test.

Thus, in the present action, if the appellant is allowed to appeal and is successful, presumably the case will continue. Perhaps the next order the appellant will ask to be relieved would be an order to disclose the names of

allegedly confidential informants, or to specify the documents relating to each of the alleged offenses, a matter as to which the defendants have been inquiring unsuccessfully since the complaint was filed four years ago. From a voluntary dismissal with prejudice the appellant could again appeal.

Thus the result of the adoption of a principle that voluntary dismissals are appealable would be to confer upon any plaintiff the power to secure an interlocutory appeal. This is not the statutory scheme.

If orders are entered which are not appealable, piecemeal appeals by taking successive voluntary dismissals, with or without prejudice, are not permissible. The fact that a contrary doctrine would permit circumvention of the statutory restriction of appellate jurisdiction to final judgments has probably been a reason why the federal courts have uniformly refused to review such voluntary dismissals. Two of the leading cases on the appealability of voluntary dismissals, *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936), and *Francisco* v. *Chicago & A. R. Co.*, 149 Fed. 354 (8th Cir. 1906), specifically discuss this problem.

Furthermore, one of the points made by Judge Parker in the *Kelly* decision is that even the few states allowing appeals from voluntary nonsuits deny appeals where the ruling sought to be reviewed relates only to a preliminary question:

> "Even in those rare jurisdictions, of which North Carolina is one, which permit appeal from an order of voluntary nonsuit where there is a ruling of the court which strikes at the heart of the case and precludes recovery by plaintiff, appeal from such order does not lie to review rulings which do not have the effect of determining the case against plaintiff" (86 F. 2d 296).

In other words, no jurisdictions permit appeals through voluntary nonsuits from rulings not for practical purposes dispositive of the issues on the merits. Refusal to order discovery by the defendant might under certain circumstances strike at the heart of a plaintiff's case; but ordering discovery by the plaintiff could never do so. Thus under no system of practice could an order to the plaintiff to produce documents be reviewed on a voluntary dismissal. Otherwise it would be impossible to limit appellate jurisdiction.

It is clear that the appellant here, having chosen not to appeal directly from the original production orders, had in mind the restrictions on interlocutory appeals. Its attempt to cause the entry of a final judgment must have been designed to avoid these restrictions. To allow such an attempt to succeed would permit a degree of circumvention of the statutes relating to appeals not possible even in the few jurisdictions which permit appeals from voluntary nonsuits in special situations.

If the appellant had applied for an extraordinary writ this Court would have had discretion to consider whether the original production orders were of a nature appropriate for direct review. By following the procedure it did, the appellant sought instead to foreclose that question and force this Court to review those orders and decide the issues raised by them.

The record shows that the appellant was well aware of the orderly procedures available for testing the reviewability of the production orders. It chose not to pursue them. It chose dismissal instead. Preservation of the limits of appellate jurisdiction requires that there be no review of this free choice.

POINT IV.

The orders to produce transcripts of grand jury testimony were a proper exercise of discretion by the court below.

For the foregoing reasons we submit that the merits of the orders to produce transcripts of grand jury testimony are not reviewable on this appeal. Even if the merits could be reached, however, we submit that it is manifest that the judgments below should be affirmed.

The court's orders are supported by two separate grants of discretionary power. Rule 6(e) of the Federal Rules of Criminal Procedure gives the court discretion to direct an attorney for the Government to disclose matters occurring before the grand jury in connection with a judicial proceeding. Rules 30(b) and 34 of the Federal Rules of Civil Procedure give the court discretion to order production of documents in the possession of parties, subject to the requirements of those rules. See *Hickman* v. *Taylor,* 329 U. S. 495, 512.

There is no question, apart from an asserted privilege against disclosing grand jury minutes to non-Government personnel, that ordering production of the minutes was a reasonable exercise of discretion. It is clear that good cause existed for their production. The present action was an antitrust suit involving the major producers in a major industry. All the signs of development into a "big case" were present. It has been generally recognized as one of the administrative principles of such litigation that each party should be compelled to make full disclosure to the other.

Here, however, the appellant is seeking to retain a large body of testimony, covering many or perhaps all of the

issues of the action, for its sole use. It is conceded that the Department of Justice has used the transcripts in the preparation and prosecution of this civil action, and will seek to use them at the trial, if there is a trial, to the extent that it deems advisable. It is idle to suggest as is done at page 7 of the jurisdictional statement that the information contained in the witnesses' testimony in 1951 and 1952 could now be duplicated by depositions, entirely apart from the time and expense involved in such an effort. The appellees do not know the areas explored. The witnesses would not recall the answers given. While we stated to the court below that we knew the identity of 28 witnesses called, we do not know how many more may have been called.

Moreover, the creation of a second set of transcripts on roughly the same subject matter would in no way lessen the advantage the Department of Justice would have through exclusive possession of the earlier transcripts, created with the witnesses at a maximum disadvantage in the isolation of the grand jury room, available for impeachment or refreshing recollection. Apart from the policy of grand jury secrecy, there is no reason that the Department of Justice should possess this advantage in this civil action, nor has any ever been suggested.

This Court said in *Hickman* v. *Taylor*, 329 U. S. 495, 507:

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.[8] Mutual knowledge of all the relevant facts

"[8] 'One of the chief arguments against the "fishing expedition" objection is the idea that discovery is mutual —that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position.' Pike and Willis, 'Federal Discovery in Operation,' 7 Univ. of Chicago L. Rev. 297, 303."

gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

With specific reference to statements of witnesses this Court said:

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning" (329 U. S. 511-2).

Transcripts of grand jury testimony are, of course, not mere statements of witnesses. They are created through process of the court, subject to penalties of contempt and perjury. They cannot be duplicated by counsel for defendants, no matter how ingenious or diligent. To give the advantage of possession of such testimony to one side but not the other clearly contravenes the liberal discovery pro-

cedure of the Federal Rules of Civil Procedure. To do so would be tantamount to allowing one party only to take depositions *ex parte*. Only some overriding consideration of public policy should permit such a result.

The appellant tries to pursue both sides of the argument. It says on the one hand that the appellees can obtain all the facts in the transcripts by taking the depositions of the witnesses. It says on the other hand that disclosure of these selfsame facts by producing the transcripts violates the public policy protecting the secrecy of grand jury proceedings, particularly to the extent that the policy of secrecy encourages witnesses to testify freely (Jurisdictional statement, page 9). Yet if the witnesses' testimony is the same, there can be no consideration of secrecy; and if it is different, the appellees will not have obtained the facts in the transcripts.

We suggest that this inconsistent position illustrates that the Department of Justice, as the beneficiary in this adversary proceeding of the exclusive possession of this testimony, is disarmed to argue the question of public policy. The continued assertion of counsel for the appellant of their right themselves to use these transcripts as they see fit, including use at the trial, shows that their interest is in the preservation not of secrecy but of their competitive advantage.

There would even appear to be a question whether the Department of Justice has any standing to protest on appeal the exercise of the court's discretion in ordering disclosure. The grand jury is often referred to as an arm of the court, *e.g.*, *Carlson* v. *United States*, 209 F. 2d 209, 213 (1st Cir. 1954). It is by no means an arm of the executive. Indeed this Court has said that its most valuable function is "not only to examine into the commission of crimes, but to stand

between the prosecutor and the accused", *Hoffman* v. *United States*, 341 U. S. 479, 485. Rule 6(e) imposes upon attorneys for the Government an obligation to disclose matters occurring before the grand jury only when directed by the court. It confers upon them no right to preservation of secrecy, and no duty to instruct the court as to public policy.

Certainly no weight can be given to a "claim of privilege" to the grand jury transcripts as "executive papers" based upon the happenstance that the Attorney General rather than the court has physical possession of them (Jurisdictional statement, page 8). The Attorney General bases this "claim of privilege" procedure on *United States* v. *Reynolds*, 345 U. S. 1, a case clearly inapplicable, inasmuch as it dealt with an effort to inquire into secret electronic equipment on a military aircraft, which equipment was not shown to have any causal connection with the accident which was the subject of the action. When the Secretary of the Air Force submitted a claim of privilege as to these military secrets, he was undeniably acting with respect to matters for which he was the responsible official.

The Attorney General, on the contrary, has no such position. He must stand here like any other civil litigant trying to preserve a competitive advantage. That this advantage was secured by what may well be regarded as a perversion of the grand jury process through its use to prepare and try a civil action is no basis for its preservation. A review of the proper role of the grand jury as outlined by this Court in such decisions as *Hoffman* v. *United States*, 341 U. S. 479, 485, and *Hale* v. *Henkel*, 201 U. S. 43, raises grave questions as to the propriety of such a procedure.

However that may be, it is apparent that none of the historic reasons for secrecy of grand jury proceedings is a basis for withholding disclosure here. The grand jury

ceased to sit more than four years ago. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-4, this Court said:

> "Grand jury testimony is ordinarily confidential. See Wigmore, supra, §2362. But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

Section 2362 of 8 Wigmore, *Evidence* (3d ed. 1940) reads in part as follows:

> "The witnesses and the complainants appearing before the grand jury must be guaranteed temporarily against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury. The secrecy is the State's inducement for obtaining testimony. • • •
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> "But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges. This much is now universally conceded:
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> "But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused:
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> • • • • • •
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> "• • • Moreover, when Doe is summoned on a civil trial involving the same matters as the criminal charge, and it is desired to impeach him by his former testimony, all motive for secrecy ends, for the

same reasons noted in par. (1), *supra*. Furthermore, in the other rare contingencies in which his testimony before the grand jury might become relevant (*post*, §2363, par. 2), justice requires in any case that Doe should not be exempted from disclosure.

"There remain, therefore, on principle, no cases at all in which, *after* the *grand jury's functions are ended*, the privilege of the witnesses not to have their testimony disclosed should be deemed to continue.

"This is, in effect, the law as generally accepted to-day. It is, however, not usually stated in such a broad form. The common phrase is that disclosure may be required '*whenever it becomes necessary in the course of justice.*' Disregarding a few local exceptions, this is in practice no narrower a rule than the one above deducible from principle."

The most recent statement of the reasons for secrecy appears to be that in *United States* v. *Rose*, 215 F. 2d 617, 628-9 (3d Cir. 1954):

"In United States *v.* Amazon Industrial Chemical Corp., D. C. Md. 1931, 55 F. 2d 254, 261, the reasons generally given for this rule of secrecy were summarized as follows: (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under

investigation, and from the expense of standing trial where there was no probability of guilt."

On the face of the matter, only the fourth reason could have any application in the present case. Wigmore, however, shows that the policy of secrecy to encourage witnesses to testify does not survive the duties of the grand jury, and a contrary rule would encourage perjury. This also was the view of the court below.

It is particularly incongruous for the appellant, who boldly asserts the right to use the grand jury for the purpose of civil discovery in antitrust cases (Jurisdictional statement, pages 14-15, fn. 7) to assert also a "privilege" as to this discovery on the ground that witnesses in antitrust investigations would not testify freely if their testimony might later be disclosed (Jurisdictional statement, page 9). Here indeed is a far cry from the traditional role of the grand jury as a shield between the prosecutor and the accused. The appellant seeks rather to convert it into a sword against the civil antitrust defendant, all in the name of preserving the sanctity of the grand jury process.

Entirely without application are such cases as *Costello* v. *United States*, 350 U. S. 359, and *United States* v. *Johnson*, 319 U. S. 503, upon which appellant relies. These decisions do not relate to discovery of testimony of witnesses before the grand jury. They are addressed to efforts to overturn the indictment in criminal actions through allegations that they were improperly returned. Even the many decisions refusing to allow inspection of grand jury minutes for alleged irregularities do not raise the question of secrecy as such but rather of the orderly administration of justice. Certainly the courts should not be placed in the position of conducting a "preliminary trial to determine the competency and adequacy of the evidence before the grand jury", *Costello* v. *United States*, 350 U. S. 359, 363.

This would be so, however, whether grand jury proceedings were secret or not. The implication at page 6 of the jurisdictional statement that the *Costello* decision relates to disclosure of grand jury testimony is without basis.

The grand jury having long since ceased to sit, and the reasons for the policy of secrecy not being applicable, it cannot be said that the district court abused its discretion in ordering disclosure. The transcripts being clearly relevant and good cause having been shown for their production, it cannot be said that the court abused its discretion in ordering production. It is, therefore, respectfully submitted that even if the merits of the orders for production of grand jury testimony can be reached on this appeal, the judgments below should nevertheless be affirmed without further argument.

Conclusion.

The appeal should be dismissed or, in the alternative, the judgments below should be affirmed.

Respectfully submitted,

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